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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)	
)	
Amendment of Section 73.202(b),)	MM Docket No. 96-95
Table of Allotments,)	RM-8787
FM Broadcast Stations.)	RM-8838
(Plattsmouth and Papillion,)	
Nebraska, and Osceola, Iowa))	

To: Chief, Allocations Branch
Policy and Rules Division

**RESPONSE TO ORDER TO SHOW CAUSE
AND REQUEST FOR HEARING**

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<u>Appendix II</u>	Declaration of Kelly Callan, dated April 21, 1998

**RESPONSE TO ORDER TO SHOW CAUSE
AND REQUEST FOR HEARING**

Platte Broadcasting Co., Inc. ("Platte"), licensee of Station KOTD-FM, Plattsmouth, Nebraska ("KOTD"), by its attorney, hereby responds to the Order to Show Cause, DA 98-489, released March 13, 1998, in the above-captioned allotment proceeding.

There is abundant good cause for not modifying KOTD's license to specify operation on Channel 299A in lieu of its current 295A. Platte will in fact prove that requiring a change of KOTD's licensed facilities would reward repeated deception and abuse of process by an opportunistic overfiler whose counterproposal was submitted for the purpose of achieving excessive financial gain through settlement. The most compelling evidence of this misconduct is contained in documents initiated and signed by the proponent of the counterproposal. Compare Garden State Broadcasting Ltd. Partnership v. FCC, 996 F.2d 386 (D.C. Cir. 1993).

In support whereof, the following is shown.

SUMMARY

This Response raises substantial and material questions of fact establishing: that the June 17, 1996 Counterproposal of LifeStyle Communications Corp., licensee of Station KJJC-FM, Osceola, Iowa ("LifeStyle"), was filed initially as an act

of angry retaliation and quickly evolved into something even more noxious; that LifeStyle's President has apparently given false testimony and lacked candor in two sworn declarations expressing an interest in building and operating a Class A station at Papillion, Nebraska, when that is in fact untrue; and that by its recurrent misuse of a counterproposal in order to extract impermissible compensation from Platte, LifeStyle has abused the Commission's processes.¹

The most persuasive evidence supporting these serious charges appears in a series of documents signed by or prepared at the instigation of James McBride. See the exhibits to the annexed Declaration of Charles Warga, Appendix 1 hereto. Mr. Warga has held numerous conversations with Mr. McBride,

¹ See Plattsmouth, Nebraska, and Osceola, Iowa (NPRM and Order to Show Cause), 11 FCC Rcd 4732 (MM Bur. 1996). Platte asks the Commission to substitute Channel 295C3 for 295A at Plattsmouth, as the only means by which KOTD's power can be increased. Regrettably, this necessitates a one-frequency change for KJJC (from 295C2 to 296C2). Platte would reimburse LifeStyle for its reasonable expenses.

LifeStyle counterproposes that it is KOTD's license which must be modified (from 295A to 299A), that KJJC should remain undisturbed and that a new Channel 295A should instead be allotted to Papillion. Both in the June 17, 1996 Counterproposal and in a subsequent October 18, 1996 Reply to Supplemental Comments (the "Reply"), LifeStyle argues that the public interest is better served by awarding a first local service to Papillion than by improving KOTD's facilities.

Twice, in statements attached to the Counterproposal and the Reply, LifeStyle President James McBride proclaims under penalty of perjury his strong intent to apply for, construct and run a Papillion station. In the latter statement, he is "eager" to do so. The Reply, n.3, says that Mr. McBride "relishes the prospect" of running a Papillion Class A and that "LifeStyle is very much interested" in it. Mr. McBride's actions prove these expressions of interest to be deceptions.

initiated by McBride, and possesses extensive firsthand knowledge. The McBride documents are in all respects corroborative of Mr. Warga's recollections.

The evidence is persuasive that LifeStyle has no interest in Papillion. Even as he and LifeStyle were repeatedly pledging their 'eagerness' for a new Papillion Class A facility, James McBride was embarked on a course of conduct aimed at ensuring that, if Platte cut a deal with LifeStyle, *there would never be an FM station in Papillion.*

James McBride has brandished his Counterproposal like a club, proffering various creative scenarios over a number of months to acquire a Class C3 KOTD from Platte at a Class A price. At that point Mr. McBride promised that the Counterproposal would be dismissed "within 5 days" and LifeStyle would be the licensee of KOTD -- as a Class C3 "Omaha" station.

After these efforts proved unavailing, in an evolving series of schemes designed to circumvent FCC reimbursement limits, Mr. McBride repeatedly offered to withdraw the Counterproposal -- for the right price. The "right" price, offered in writing by James McBride, opened at \$250,000 and has now been raised to **\$750,000.00**. And the offer is still on the table today! See Section II and App. 2.

Mr. McBride's documented attempts to obtain KOTD or receive a payoff to dismiss his Counterproposal make a mockery

of his repeated expressions of interest in Papillion. Collectively they comprise the most serious misconduct.

LifeStyle's Counterproposal is a classic "strike pleading." It was filed first to obstruct and delay, and has since been employed as leverage for extortion. It offends established case law, see Section III, will shock the conscience of the Commission, and cannot be approved. Platte's fair and sensible proposal should be enacted.

Alternatively, Platte formally requests, pursuant to Section 316 of the Communications Act of 1934, as amended, and Section 1.87 of the Commission's Rules, that a hearing be convened to explore the matter fully. Such a hearing must focus, in addition to the merits of the Counterproposal, on whether LifeStyle has the requisite character qualifications to remain an FCC licensee.

The evidence supporting this Response justifies such a hearing, see Section I. Platte formally states its intention to appear at hearing and give evidence relevant to those matters contained in a hearing order about which it has knowledge. § 1.87(f).²

² An application to transfer control of Platte to Waitt Radio, Inc. ("Waitt") has been approved. Upon consummation of the transfer, Platte's new owners will submit a statement reaffirming this request for hearing and Platte's pledge to assist the Commission in the search for truth.

I. APPLICABLE LEGAL STANDARDS

The Communications Act and FCC Rules mandate that this Response meet the specificity requirements of Section 309 of the Act for petitions to deny: it must present a substantial and material question of fact; 47 U.S.C. § 316(a)(3); 47 C.F.R. § 1.87(d);³ Modification of FM or Television Licenses Pursuant to Section 316 of the Communications Act, 2 FCC Rcd 3327, 3328 ¶ 6 (1987).⁴

Limitations on Compensation. Commission Rule 1.420(j) states that whenever a party filing an expression of interest in amending the FM or TV Table of Allotments seeks to dismiss or withdraw the expression of interest:

that party must file with the Commission a request for approval of the dismissal or withdrawal, a copy of the agreement related to the dismissal or withdrawal, and an affidavit setting forth:

³ Under Section 309(d)(1) of the Act, petitions to deny must "contain specific allegations of fact sufficient to show that . . . a grant of the application would be prima facie inconsistent with subsection (a)," and "[s]uch allegations of fact shall, except for those of which official notice may be taken, be supported by affidavit of a person or persons with personal knowledge thereof. . . ."

Subsection (a) of § 309 mandates a determination "whether the public interest, convenience and necessity will be served by the granting of" an application.

⁴ "In such event, [the Commission] would designate the proposed modification of license or permit for hearing under Section 316 . . . We may also find that the licensee has raised sufficient reasons why the public interest would not be served by the proposed modification in which case the proposal could be denied without the need for a hearing." *Id.* (citation omitted)

(1) A certification that neither the party withdrawing its interest nor its principals has received or will receive any money or other consideration in excess of legitimate or prudent expenses in exchange for the dismissal or withdrawal of the expression of interest. . . .

.

Section 1.420(j) was added to the Rules in an Order aptly titled: Amendment of Sections 1.420 and 73.3584 of the Commission's Rules Concerning Abuses of the Commission's Processes, 5 FCC Rcd 3911, 67 RR 2d 1526 (1990), *recon. denied*, 6 FCC Rcd 3380, 69 RR 2d 483 (1991) (hereafter, the "Abuse Order"). Its applicable purpose is preventing "non-bona fide expressions of interest," 67 RR 2d at 1532 ¶ 27.

The Abuse Order, at 67 RR 2d 1533 ¶ 27, posits, in eerily prophetic language:

[t]he intent in this proceeding . . . has been to deter abuse of our processes, and particularly, to prevent disingenuous filings which delay or obstruct legitimate proposals. ***An abusive party may ransom the withdrawal of its conflicting filing and thereby profit from abuse of our processes.*** The scope of our concern in this proceeding necessarily extends, therefore, to any conflicting filing with a potential functionally equivalent to that of a counterproposal ***to preclude or postpone favorable disposition of an initial allotment rule making petition.*** . . . (Emphasis added.)

Likewise, at 67 RR 2d 1533 ¶ 29:

a statement of interest in operating a station made by a party who, in fact, lacks the

requisite intent to construct and operate the proposed facility will henceforth be considered a **material misrepresentation** within the meaning of Section 73.1015 of the Rules and would be subject to prosecution subject to Section 502 of the Act, forfeiture subject to Section 503 of the Act or other appropriate administrative sanctions (Emphasis added, citations omitted.)^{5 6}

In denying reconsideration of the Abuse Order, the Commission reaffirmed, at 69 RR 2d 484 ¶ 7, that its policy seeks to foreclose the prospect that

a filer could place himself in a position to reap a settlement windfall by filing a conflicting allotment proposal and then offering to withdraw that proposal so that the licensee would not be precluded from upgrading its station. In such situations, the speculative filer's costs and risks associated with filing are minimal compared to the benefit that he may gain from settlement.

The Abuse Order could have been written with LifeStyle as its intended example.

In licensing cases the FCC has imposed its harshest penalties after uncovering misconduct comparable to that alleged here against LifeStyle. See, e.g., West Jersey

⁵ Rule 73.1015, prohibiting material misrepresentations in written submissions to the Commission, was amended by the Abuse Order to encompass false statements in allotment proceedings. 67 RR 2d at 1533 n.40.

⁶ Contrast LifeStyle's Reply, n.3: "the FCC has held that motive in a rulemaking is irrelevant. FM Channel Assignments (Eatonton and Sandy Springs, GA, and Anniston and Lineville, AL), 6 FCC Rcd 6580, 6580 (MMB 1991)." Not only does the cited case not hold what LifeStyle claims it does, but the Abuse Order confirms beyond question that "motive in a rulemaking" is a highly relevant consideration.

Broadcasting Co., 90 FCC 2d 363 (Rev. Bd. 1982) (license renewal denied where a \$25,000 payment in excess of authorized reimbursement constituted a prohibited payoff); Garden State Broadcasting Ltd. Partnership v. FCC, *supra* (application filed to procure an extortionate monetary settlement from a renewal applicant dismissed as an abuse of process). The Abuse Order signals the Commission's determination to closely scrutinize and, where appropriate, severely sanction similar abuses in allotment proceedings.⁷

The following sections reveal how closely LifeStyle's actions mirror the misconduct described in the Abuse Order.

II. HISTORY OF THE CASE

Appendix I consists of the Declaration of Platte President Charles Warga. A number of exhibits are attached:

- Ex. 1: October 18, 1996 McBride Declaration;
- Ex. 2: November 15, 1996 McBride proposal to acquire KOTD as a Class C3 station;
- Ex. 3: January 8, 1997 McBride proposal to withdraw the Counterproposal in return for a \$250,000 "loan" by Platte, the proceeds of which are to be "forgiven";

⁷ Rule 1.420(j) is a relatively recent addition to the Rules and no allotment cases comparable to West Jersey Broadcasting Co. or Garden State Broadcasting are yet reported. However, since it came into effect, the Commission has not hesitated to reject rulemaking settlements where the promised payments were excessive; e.g., Banks, Redmond, Sunriver and Corvallis, Oregon, DA 98-612 (MM Bur.), April 3, 1998; TRMR, Inc., 11 FCC Rcd 17081 (Comm. 1996). In each of these cases the parties' actions were scrutinized and expressly found to be well-intentioned.

- Ex. 4: Draft LifeStyle Settlement, Loan and Escrow Agreements;
- Ex. 5: Engineering and marketing analyses of KOTD as a Class C3 "Omaha" station;
- Ex. 6: February 24, 1998 "Confidential" counter offer from McBride, offering to withdraw the Counterproposal for "Seven Hundred and Fifty Thousand Dollars US".

All of these exhibits are either signed by James McBride or were prepared at his instigation. Their genuineness is incontestable and their underlying intent indisputable. They establish that even while strongly urging the Commission to grant his Counterproposal and reject Platte's, Mr. McBride was actively pursuing arrangements to assure the grant of Platte's proposal and the dismissal of the Counterproposal. The evidence reflects that Mr. McBride has been playing the Commission and Platte against each other, for McBride's own profit. That constitutes egregious abuse.

Mr. Warga affirms that in numerous discussions with James McBride, some of them occurring weekly, spanning a period of some 18 months, never once was Papillion mentioned. Mr. McBride never expressed an intention to have a station there. His attention was focused on buying KOTD, as an upgraded Class C3 facility.⁸ App. 1, *passim*.

⁸ It bears repeating that KOTD and Papillion are mutually exclusive. The only way KOTD could be a C3 was if LifeStyle withdrew its Counterproposal. There is proof that Mr. McBride was aware of that and used it to bludgeon Platte into an agreement favorable to McBride. See App. 1 and Exhibits, *passim*.

Mr. Warga never met or spoke with Mr. McBride until after the Counterproposal was submitted. Mr. McBride initiated the dialogue, "and his subject was always money." App. 1 at 4.

Mr. McBride first telephoned Mr. Warga in about September 1996, angry that Platte's proposal would require a KJJC channel change. Mr. McBride said he had spent many years "advertising" KJJC as is and wasn't about to allow a channel switch unless he was "properly compensated" for it.⁹ App. 1 at 5-6.

The McBride anger quickly changed to ardor when he realized KOTD's potential as a 25 kW station. He visited Mr. Warga and expressed a strong interest in buying KOTD. But only as a 25,000 watt station. App. 1 at 6.

During prolonged negotiations, Mr. McBride often told Mr. Warga how much more valuable KOTD would be at 25 kW. He reassured Mr. Warga that he could withdraw the Counterproposal whenever he wished, saying: "Don't worry, Charlie. As soon as we get together on an agreement, that thing will go away within five days." App. 1 at 4-5, 6.

⁹ KJJC is a powerful 50,000 watt station. Mr. McBride resented being moves to accommodate 6,000 watt KOTD, App. 1 at 5. However, as LifeStyle itself has said: "Petitioner holds no exclusive right to an upgrade where other changes to the Table of Allotments are required." Reply at 5. LifeStyle was referring to Platte at the time, but its wisdom applies equally to LifeStyle.

Various McBride offers for KOTD were made over the next year and a half. One, dated November 15, 1996, proposed a Consulting Agreement which would pay Mr. Warga \$250,000 over five years, "with first payment due 12 months after C-3 operation begins." App. 1 at 6-7; Ex. 2. This offer came less than a month after Mr. LifeStyle had assured the Commission of Mr. McBride's 'eagerness,' "relish" and profoundest interest in Papillion. Reply at 3; App. 1, Ex. 1.

At the end of 1996, when negotiations lagged, James McBride offered simply to withdraw the Counterproposal for a flat cash payment of \$250,000. Told this violates Commission rules, Mr. McBride embarked on new stratagems to "get around the FCC" and "paper it over." App. 1 at 8.

On January 8, 1997, Mr. McBride proposed in writing to withdraw the Counterproposal "within 5 days of any signed agreement," if Platte would pretend to "loan" LifeStyle \$250,000 in an up-front cash payment. App. 1, Ex. 3. Mr. Warga observes: "it was a 'loan' in name only since under its terms LifeStyle would never have to repay a cent of it." Instead, Platte would "forgive" a tenth of the "loan" each year, "for tax purposes."¹⁰ App. 1, Ex. 3. According to Mr. McBride, this offer was intended "to 'get around the FCC.'" App. 1 at 9.

¹⁰ Mr. McBride was apparently worried, and with good reason, about both the IRS and the FCC.

The "loan" idea was refined a month later, in a set of draft agreements (a "Settlement Agreement," "Loan Agreement" and "Escrow Agreement") sent by LifeStyle to Mr. Warga in February 1997. App. 1, Ex. 4. This represented yet another effort to circumvent Commission compensation limitations. App. 1 at 9.

In the February 1997 version, two up-front payments totalling \$250,000 are proposed: \$15,000 in return for dismissing the Counterproposal;¹¹ and \$235,000 as a ten-year "loan" to reimburse LifeStyle for the one-channel KJJC switch. A tenth of the "loan" would be "forgiven" annually. See App. 1, Ex. 4, Loan Agreement at ¶ 6. Mr. Warga considered the \$235,000 "reimbursement" figure outrageous. Mr. McBride assured him the lawyers would find a way to "paper it over." App. 1 at 9-10. The "loan" proposal got nowhere.

Mr. McBride's zeal to acquire and upgrade KOTD was so consuming that he had LifeStyle's consulting engineer conduct studies on an optimal tower site and height from which a Class C3 KOTD signal could most effectively blanket the Omaha market. Mr. McBride was calling Mr. Warga regularly now, sometimes weekly, with progress reports. App. 1 at 7.

Mr. McBride was determined to find a site which would enable him to extend a city grade KOTD signal all the way to

¹¹ This more realistic figure reflects how much LifeStyle actually felt entitled to under Rule 1.420(j) for withdrawing the Counterproposal. Viewed against this number, Mr. McBride's latest withdrawal price of \$750,000 is scandalous.

"72nd and Dodge" Streets, the very center of Omaha. App. 1 at 7. He found such a site and had LifeStyle's engineer depict KOTD's proposed coverage of "72nd and Dodge" from two different tower heights on the site. He sent these studies to Mr. Warga in April 1997. App. 1 at 8; Ex. 5, pp. 1-4. He told Mr. Warga "he needed a tower at least 650 feet tall to make KOTD an 'Omaha' station, and spent a lot of time during our negotiations trying to get FAA authorization to go up that high." App. 1 at 8.

Mr. McBride also analyzed the Omaha radio market, comparing Omaha station facilities and formats. App. 1, Ex. 5, pp. 5-6. He was actively considering which format his upgraded KOTD would switch to, and discussed it with Charles Warga. App. 1 at 7. At different times, Mr. McBride put the value of Class C3 KOTD at "between two and four million dollars." App. 1 at 8. His purchase offers, however, never approached even the lower figure; *e.g.*, App. 1, Ex. 2.

During the long negotiation period, Mr. McBride also suggested that Mr. Warga let him acquire a substantial ownership interest in Platte, "again with the specific intention of upgrading KOTD and withdrawing the Papillion counterproposal, and then reselling KOTD for a fast profit." App. 1 at 8. Mr. McBride promised that if he and Platte joined forces, the resale price of KOTD would "skyrocket." *Id.* This suggestion was rejected.

While in Nebraska Mr. McBride was striving zealously for many months to obtain a Class C3 KOTD, LifeStyle's persistent position at the FCC was that the public interest is better served by a Papillion allotment and rejection of the KOTD upgrade. Again, Mr. McBride was trying to have it both ways. He used his Counterproposal as a lever to pry financial concessions from Platte, to upgrade KOTD, while simultaneously arguing to the Commission that such an upgrade is undesirable. Official Notice requested. The Abuse Order and cases cited in Section III make clear that such manipulation of FCC procedures for personal financial advantage is improper.

In early 1998, the aforementioned agreement was reached with Waitt to acquire Platte and KOTD. Kelly Callan, a broker with Kalil & Co., approached Mr. McBride at Waitt's behest in February 1998 with an offer both to acquire KJJC and have the Counterproposal withdrawn. Mr. McBride responded with a written "Counter Offer" dated February 24, 1998. His price for withdrawing the Counterproposal had now tripled, to \$750,000. App. 1 at 10-11; Ex. 6.¹²

Annexed hereto as Appendix 2 is the Declaration of Kelly Callan. He avers that at the request of Waitt's President, in April 1998 he once again contacted the broker representing LifeStyle, both about purchasing KJJC and withdrawing the Counterproposal. Mr. Callan was told that

¹² Mr. Warga ponders, understandably, how "the lawyers" were going to "paper over" so preposterous a demand. App. 1 at 11.

KJJC is no longer on the market but that the \$750,000 offer to withdraw the Counterproposal continues in effect. When Mr. Callan protested the price, he was told firmly that "\$750,000 was not much for allowing KOTD to expand its signal into Omaha." App. 2.

At no time during the extended period when Mr. McBride was actively pursuing the acquisition and upgrade of KOTD did LifeStyle advise the Commission of a change of heart about Papillion. It never sought to withdraw its Counterproposal. LifeStyle has not informed the Commission that it was negotiating with Platte to effect a purchase of KOTD which if successful would necessitate the dismissal of the Counterproposal. Official Notice requested.

The record reflects, and it is reasonable to conclude, that LifeStyle has used its Counterproposal to effectively hold Platte, and the Commission, hostage for nearly two years. LifeStyle's purpose was securing an improper financial gain. Its actions to date depict a veritable reenactment of the nightmare scenarios postulated in the Abuse Order, pp. 6-7, above, and a paradigm of an abuse of Commission procedures.

III. LAW OF THE CASE

In Section II Platte has raised substantial and material questions of fact establishing that LifeStyle has intentionally deceived the Commission in this allotment

proceeding. It has used its Counterproposal both as a club to block Platte from upgrading KOTD and as a lever to extract a favorable purchase price for the station. Alternatively, LifeStyle is using the Counterproposal to extort excessive compensation for its dismissal. The Commission's attitude toward such conduct is apparent from a review of the apposite case law.

Misrepresentations/Lack of Candor

The FCC holds applicants to a high standard of candor and forthrightness; an overburdened agency must rely heavily on their truth and accuracy. RKO General, Inc. v. FCC, 670 F.2d 215, 232 (D.C. Cir. 1981), *cert. denied*, 456 U.S. 927 (1982). It follows that "applicants . . . have an affirmative duty to inform the Commission of the facts it needs in order to fulfill its statutory mandate," *id.* Intentional misrepresentations or knowing non-disclosures of material facts are intolerable. FCC v. WOKO, Inc., 329 U.S. 223, 227 (1946); Nick J. Chaconas, 28 FCC 2d 231, 233 (1971); Fox River Broadcasting, Inc., 93 FCC 2d 127 (1983).

The evidence in App. 1 and 2, summarized in Section II, is compelling that LifeStyle has deceived the Commission for nearly two years. LifeStyle submitted its Counterproposal as an act of vengeance and maintained it as an act of greed. James McBride admitted to Charles Warga that he filed the

Counterproposal out of anger because Platte's rulemaking request would force powerful KJJC to make way for little KOTD.¹³ App. 1. Soon after, when Mr. McBride saw KOTD's coverage, and monetary potential, his attitude and actions changed diametrically. Everywhere except at the Commission, where he continued to maintain an "eager" interest in a Class A station at Papillion. LifeStyle has played fast and loose with the truth, with Platte, and with the Commission.

Notwithstanding his rhapsodizing over Papillion, the record reflects that Mr. McBride's true "relish" has been the acquisition of KOTD, as an upgraded Class C3 facility. *This is precisely what Platte seeks here and LifeStyle officially opposes here.*

At minimum, from at least the time when James McBride commenced active negotiations with Charles Warga to acquire KOTD as a 25 kW "Omaha" station: expending resources on locating an "Omaha" site with coverage all the way to "72nd and Dodge"; conducting "Omaha" market and format research; and investigating FAA limitations on "Omaha" tower heights; LifeStyle was under "an affirmative duty" to so advise the Commission, "in order to [enable the FCC to] fulfill its statutory mandate." RKO General, Inc., 670 F.2d at 232. A rulemaking proponent has a legal obligation to dismiss its expression of interest from the time when it "lacks the

¹³ KJJC and KOTD do not serve common areas and are not competitors. See App. 1 at 3.

requisite intent to construct and operate the proposed facility," Abuse Order at 67 RR 2d 1533 ¶ 29.¹⁴ If LifeStyle ever actually had such an intent with Papillion, it has long since withered.¹⁵

By refusing when its interests veered to withdraw its Counterproposal, by continuing to press the Commission for an allotment which its own actions would render impossible, LifeStyle has misrepresented material facts and demonstrated a shocking lack of candor. Lack of candor and misrepresentation are both disqualifying offenses. Fox River. By cavalierly manipulating the FCC for its own financial gain, LifeStyle has forfeited the right to be believed.¹⁶

More recently, when negotiations on KOTD lagged, James McBride dangled various creative scenarios admittedly intended

¹⁴ LifeStyle's cynicism is evident in its Reply at 6. There, LifeStyle chastises Platte for "fail[ing] to do what every petitioner in a rulemaking proceeding should do when it initiates a rulemaking proceeding to change the table of allotments. It was shortsighted. It failed to think the situation through to anticipate the changes its original proposal might trigger." In other words, LifeStyle faults Platte for seeking the relief it actually needs, without resorting to tactical gamesmanship to block enterprising overfilers with less scrupulous agendas. LifeStyle has plainly taken its own cynical advice to heart.

¹⁵ Beyond a doubt, now that it cannot have KOTD and its extortionate withdrawal demands are firmly repulsed, LifeStyle will argue once more with feeling that it is "eager" for Papillion. The Commission will easily see through that facade.

¹⁶ The motive for deception is obvious. Mr. McBride wanted to buy a Class C3 KOTD at a Class A price. Failing that, he made good on his threat to Charles Warga that he was not about to let KJJC change frequencies unless he was properly compensated. App. 1 at 5-6.

to circumvent FCC reimbursement limits. He assured Mr. Warga that this could be "papered over." That says everything necessary about LifeStyle's propensity for truth.

Mr. McBride first offered to promptly withdraw the Counterproposal for \$250,000 cash. Told that this exorbitant amount offends FCC policy, LifeStyle composed two variations on the same theme: Platte would "loan" the money to LifeStyle, with the proviso that none of the "loan" would ever be repaid. Mr. McBride promised again to find a workable way to cover this pretext. He even had the *chutzpah* to demand that Platte's "forgiveness" extend over ten years -- "for tax purposes." App. 1, Ex. 2-4.¹⁷

Lately (upon learning that KOTD was sold to someone else), Mr. McBride brazenly tripled his demand. Now he offers in writing to dismiss the Counterproposal for \$750,000. LifeStyle's broker insists \$750,000 is a bargain price for an "Omaha" signal. App. 2. The Commission may not agree.

The "fundamental importance of truthfulness and complete candor on the part of applicants, as well as licensees, in their dealings with the Commission is well established." Lebanon Valley Radio, Inc., 35 FCC 2d 243, 258 (Rev. Bd. 1972 (subsequent history omitted.) So is an applicant's obligation "to be completely forthcoming in the

¹⁷ Mr. McBride apparently believed that Commission staff would not easily see through so obvious a subterfuge. Or he intended to bypass the agency altogether.

provision of information which could illuminate a decisional matter." Coastal Bend Family Television, Inc., 94 FCC 2d 648, 658 (Rev. Bd. 1983), *quoting from* Fox River Broadcasting, Inc., 88 FCC 2d 1132, 1137 (Rev. Bd. 1982). The evidence is overwhelming that LifeStyle turned its back on these obligations in order to turn a fast buck.

It should therefore be concluded that substantial and material questions have been raised concerning LifeStyle's truthfulness and candor. On this ground alone there is good cause to summarily reject the Counterproposal.

Abuses of Process

The FCC "is not expected to play procedural games with those who come before it in order to ascertain the truth." RKO General, Inc., at 670 F.2d 229.

The agency's abuse of process policies and rulings "essentially are designed to inhibit the filing of non-bona fide pleadings or applications for the purpose of delay or extracting a profit from settlement." TRMR, Inc., *supra*, at 11 FCC Rcd 17086 ¶ 9 (1996) (Citations omitted.)

Abuse of process apprehends "serious misuse of Commission procedures," Tung Broadcasting Co., 23 RR 2d 1185, 1189 (Rev. Bd. 1972). It "ordinarily involves an intent to gain some benefit by manipulating them," TRMR, Inc., at 11 FCC Rcd 17087 ¶ 10.

Abuse encompasses "the disingenuous invocation of the Commission's settlement procedures for the purposes of obstructing a hearing or for extracting better terms from a competing applicant who has shown himself amenable to settlement." Margaret J. Hanway, 59 RR 2d 1296, 1299 ¶ 9 (Rev. Bd. 1986), *citing* GACO Communications Corp., 94 FCC 2d 761 (Rev. Bd. 1983) (subsequent history omitted.); Garden State Broadcasting Ltd. Partnership v. FCC.¹⁸

Abuse of process is "a potentially disqualifying offense, even when it 'only' pertains to misconduct in settlement negotiations." Margaret J. Hanway, at 59 RR 2d 1299 ¶ 9; Gulf Coast Communications, Inc., 81 FCC 2d 499 (Rev. Bd. 1980) (subsequent history omitted); *see also, generally, Abuse Order, supra.*

While not always easy to prove, the Commission has recognized that "incentives and mechanisms for abuse, such as filing an application for the purposes of achieving a settlement, have been inherent in the licensing process." First Report and Order in BC Docket No. 81-742, 4 FCC Rcd 4780, 4782 ¶ 21 (1989).

Abuse of process can involve enrichment or delay. In extraordinary cases, like this one, it can involve both. To ascertain whether delay is a primary purpose in an FCC filing,

¹⁸ "[T]he Commission need [not] allow the administrative processes to be obstructed or overwhelmed by captious or purely obstructive protests." United Church of Christ v. FCC, 359 F.2d 994, 1005 (D.C. Cir. 1966).

the Commission typically weighs these factors: (1) statements by principals or officers of a licensee admitting an obstructive purpose; (2) withholding information relevant to a determination of issues raised; (3) the absence of a reasonable basis for allegations raised by the licensee; (4) economic motivation indicating a delaying purpose; and (5) other licensee conduct. Radio Carrollton, 69 FCC 2d 1139, 1151 (1978), *clarified*, 69 FCC 2d 424 (1978) (subsequent history omitted) (license renewal denied following "strike pleading" filed primarily to obstruct, impede and delay the grant of another application).

Based on the evidence, at least four of the five Radio Carrollton factors are satisfied in this case:

(1) Licensee Statements. *Inter alia*, James McBride's expression of anger to Charles Warga about Platte's rulemaking proposal and his insistence that he would not allow a channel switch without substantial compensation; his admission that the successive \$250,000 and \$15,000/\$235,000 "loan" proposals were structured to "get around" the Commission's Rules; his assurance that the lawyers could "paper over" these excesses; his pledge that "that thing will go away within five days" after an agreement with Platte. See App. 1 and Exhibits.

(2) Withholding Relevant Information. LifeStyle has never informed the Commission of its efforts to acquire KOTD, in contravention of its expressions of interest made under

penalty of perjury. It has simultaneously pursued both the Counterproposal and the upgrading of KOTD, which are mutually exclusive and inherently inconsistent, to LifeStyle's economic advantage. LifeStyle cynically used the withdrawal of the Counterproposal as leverage to extract excessive compensation.

(4) Economic Motivation. Dismissal of the Counterproposal would increase KOTD's value, making it more costly for LifeStyle to acquire. The Counterproposal also represents an opportunity, foreseen in the Abuse Order, for LifeStyle to "ransom the withdrawal of its conflicting filing and thereby profit from abuse of [FCC] processes." 67 RR 2d at 1533 ¶ 27.

(5) Other Misconduct. LifeStyle has deceived the Commission about its "interest" in a Papillion station. There is firsthand evidence that the Counterproposal was from the outset a "strike pleading" filed as an act of retaliation. Also, Mr. McBride's restated demand for \$750,000 to dismiss the Counterproposal exemplifies LifeStyle's continuing disregard for the Commission's policies and standards.

Individually and collectively, LifeStyle's actions constitute a "serious misuse of Commission procedures." Tung Broadcasting Co., at 23 RR 2d 1189.

It must therefore be concluded that substantial and material questions have been raised concerning LifeStyle's willful and repeated abuse of the Commission's processes.